in the

Supreme Court

of the

United States

OCTOBER TERM, 1978

NO. 78-126

BARNETT GUTHARTZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner, BARNETT GUTHARTZ, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered the 18th day of May 1978, affirming his conviction under 18 U.S.C.A., §1001, and that on hearing the judgment of conviction be reversed.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A) is not yet reported.

The judgment of the District Court (App. B) was not reported and an opinion of said Court overruling Defendant's Motion for Judgment of Acquittal Notwithstanding the Verdict (App. C) was not reported either.

JURISDICTION

The judgment of the Court of Appeals (App. D) was entered on May 18, 1978. Timely Petition for Rehearing, together with a Petition Suggesting Rehearing En Banc, was filed and was denied (App. E) on June 26, 1978. This Court has jurisdiction under 28 U.S.C.A. §1254(1).

QUESTIONS PRESENTED

Title 18, U.S.C.A., §1001, *infra,* condemns three separate and distinct courses of conduct. Briefly stated these are: (1) the willful falsification, concealment or cover up by any trick, scheme or device, of a material fact; (2) the making of false, fictitious, or fraudulent statements or representations; or (3) the making or using of any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry. Each of the foregoing modes of violation constitutes a crime under the aforesaid statute. In light of the fact that Congress has seen fit to make such distinctions, the questions presented under the circumstances are:

1. Whether the enclosure in a letter from Petitioner to the F.H.A. of an erroneous cost estimate prepared by a third party, *per se,* constitutes the making of a false statement by Petitioner under 18 U.S.C.A., §1001.

2. Whether there is a fatal variance between the *allegata et probata* in a conviction under 18 U.S.C.A., §1001 where the specific false statement, charged by the Grand Jury indictment to have been made by means of a letter from Petitioner to the F.H.A., does not appear in that letter and, in addition, differs completely from any statement made by Petitioner in that letter.

3. Whether it was improper and prejudicial to Petitioner for the Trial Court to charge the jury to determine a question of law, particularly where the charge was so framed that the determination thereof necessarily compelled a conclusion that the enclosure of

an erroneous cost estimate in a letter from Petitioner to the F.H.A. (i.e. its use) constituted the making of a false statement under 18 U.S.C.A., §1001.

4. Assuming, *arguendo,* that the enclosure of the cost estimate in the letter from Petitioner to F.H.A. constituted the making of the false statement charged in the Grand Jury indictment, whether such statement was immaterial where it did not possess the *de jure* capacity to influence any action by the F.H.A. and where any alleged reliance thereon would have been contrary to the facts, contrary to ordinary common sense, mathematically impossible, and in complete conflict with the statements actually made by the Petitioner in the letter.

5. Whether 18 U.S.C.A., §1001 permits and warrants the charging of Petitioner with making false statements, contained in a single sentence of a letter from Petitioner to the F.H.A., in separate, multiple counts of a Grand Jury indictment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

18 U.S.C.A., §1001 provides as follows:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fradulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

The Grand Jury indictment in Case No. 77-36-CR-NCR before the United States District Court for the Southern District of Florida, handed down on January 17, 1977, charged Petitioner with two (2) counts of violating 18 U.S.C.A., §1001 and reads as follows:

"The Grand Jury charges that:

COUNT ONE

On or about August 29, 1975, in the Southern District of Florida, the defendant, BARNETT GUTHARTZ, did wilfully and knowingly in a matter within the jurisdiction of the Department of Housing and Urban Development, an agency of the United States, make and cause to be made, by means of a letter to an official of the United States Department of Housing and Urban Development in the Southern District of Florida, a materially false, fictitious and fraudulent statement that the purchase and installation of a cooling tower cost $18,000.00 when in truth and in fact as he then and there well knew the actual cost of the purchase and installation of said cooling tower was $12,869.12; said materially false, fictitious and fraudulent statement was made to induce the United States Department of Housing and Urban Development to approve an increase in the rent for the units at the Bay Terrace Apartments, of which the defendant, BARNETT GUTHARTZ, is the owner and of which the

United States Department of Housing and Urban Development is the mortgagee; all in violation of Title 18, United States Code, §1001.

COUNT TWO

On or about August 29, 1975, in the Southern District of Florida, the defendant, BARNETT GUTHARTZ, did wilfully and knowlingly in a matter within the jurisdiction of the Department of Housing and Urban Development, an agency of the United States, make and cause to be made, by means of a letter to an official of the United States Department of Housing and Urban Development in the Southern District of Florida, a materially false, fictitious and fraudulent statement that the installation of a fire alarm system cost $3,800.00 when in truth and in fact as he then and there well knew the actual cost of the installation of said fire alarm system was $1,900.00; said materially false, fictitious and fraudulent statement was made to induce the United States Department of Housing and Urban Development to approve an increase in the rent for the units at the Bay Terrace Apartments, of which the defendant, BARNETT GUTHARTZ, is the owner and of which the United States Department of Housing and Urban Development is the mortgagee; all in violation of Title 18, United States Code, §1001.

A TRUE BILL"

Petitioner entered pleas of "Not Guilty" as to each Count and moved to dismiss the indictment, which motion was denied. Following the course of customary pretrial motions and orders the cause was subsequently tried by jury. This resulted in a jury verdict whereby Petitioner was found "Not Guilty" as to Count One and "Guilty" as to Count Two.

Confining ourselves, at this point, to a consideration only of the factual aspects involved in Count Two we respectfully direct the attention of this Court to the following brief summary of those aspects which we consider material to this Court's consideration of the questions presented above and the reasons for granting certiorari presented below.

The specific statement that Petitioner is charged, in the indictment, with having made by means of a letter dated August 29, 1975 to an official of the Department of Housing and Urban Development (herein referred to as the "F.H.A.") is: "that the installation of a fire alarm system cost $3800.00". On its face it is crystal clear that the quoted statement did not appear in the letter (as the prosecution, the trial court and Fifth Circuit freely admit.) Instead the conviction of Petitioner was founded and sustained upon an unique theory. The letter of August 29, 1975 did contain a statement (the truth of which Petitioner had no opportunity to prove or defend under the wording of the indictment and the proof relied upon by the prosecution) that: "we were forced to expend $6,400.00 for a Manual Fire Alarm system." Although the letter indicated other specific enclosures, and there was conflicting evidence that enclosed within that letter may have been an earlier cost estimate (not referred to in the letter) prepared by a

third party indicating that the installation portion of the cost of the fire alarm system was projected at $3,800.00, the Trial Court accepted the same as proof of the making of the charged false statement and the Fifth Circuit affirmed the conviction as charged on the thesis that (App. A at p. 7): "The jury may permissibly have concluded that an integral part of his written statement (*viz.* "that a new fire alarm system would cost $6,400.00") was the false estimate showing the installation charge portion of such cost to be $3,800.00." This was notwithstanding the fact that the undisputed cost for the materials (not counting taxes, delivery or other related cost items) was established to be $3,300.00 which, taken together with the $3,800.00 figure, and nothing more, would have yielded an aggregate cost figure of $7,100.00, obviously well in excess of the figure stated by Petitioner in the letter. Moreover, the undisputed testimony of the government witnesses was that the document in question was an estimate, not a contract or statement, and the only thing contained in the letter which was relied upon in allowing Petitioner the rent increase was his statement as to the cost of $6,400.00 and his signature at the bottom of the letter. Moreover, according to the testimony of the Government's own witnesses and the Government's Exhibits, it was established that before final approval of a rent increase was granted paid bills, cancelled checks, and sometimes further information were required; that before final approval of a rent increase, installation had to be completed and as late as several months after the letter in issue the installation of the fire alarm system was not finished since additional work was necessary and substantial additional sums had to be expended by Petitioner in order to obtain approval by the local fire department; that the attention of the F.H.A. had been

drawn to the fact that the $3,800.00 proposal for the installation cost of the fire alarm system was erroneous, well before any decision was made to award a rent increase; and that all approvals of requested rent increases had to be in accordance with the procedures and practices set out in the HUD Handbook and the procedures recited in Federal Register, Vol. 40, No. 90.

At the conclusion of the trial the District Court made a number of charges to the jury. Included in these was one in particular which stated:

> "The U.S. Department of Housing & Urban Development is an agency of the United States and statements contained in a letter to an official of that agency are matters within the jurisdiction of an agency of the United States.
>
> A letter to a Department official is a statement, representation, writing or document within the meaning of the statute. Whether the letter referred to in the indictment includes its enclosures is a question to be resolved by the jury."

Counsel for Petitioner objected to this charge upon the grounds that the Grand Jury indictment made no reference to "enclosures" and that the specific charges brought in the indictment were being broadened to include the very aspect of 18 U.S.C.A., §1001 that the Grand Jury failed to charge: *i.e.* the "using" of a false writing or document. This was of special significance in the light of the Court's preceding charge that the essential elements of the offense charged in the indictment were:

> "1. The act or acts of making or using a false or fraudulent statement or representation;
>
> 2. That it was made or used in relation to a matter within the jurisdiction of a department or agency of the United States;
>
> * * * "

The objections were overruled and the charges made as stated above.

Following rendition of the jury's verdict Petitioner filed a Motion for Judgment of Acquittal Notwithstanding the Verdict which the District Court denied with opinion (App. C) and thereafter the District Court entered its judgment and sentence (App. B) as to Count Two.

Petitioner then filed his appeal to the Fifth Circuit raising, as prejudicial error warranting reversal of the conviction on Count Two, the following issues: (1) a defect in the wording of the indictment charging Petitioner with commission of a crime materially different from the one upon which a conviction was sought; (2) a fatal variance between the crime as charged in the indictment and the proof offered in support thereof; (3) lack of materiality, as a matter of law, of the matter allegedly mis-stated; (4) multiplicity of charges under that portion of a statute which condemns a single offense; (5) a jury charge compelling determination of a question of law by the jury, which was prejudicial to Petitioner; and (6) failure to grant a new trial based upon newly discovered evidence.

In its opinion (App. A) the Fifth Circuit expressly rejected the position asserted by Petitioner as to the first, second, third and sixth points and apparently ignored (and, by its silence, presumably rejected summarily) the fourth and fifth points completely.

Petitioner thereafter filed, simultaneously, a Petition for Rehearing and a Petition Suggesting Rehearing En Banc, both of which were denied by the Fifth Circuit (App. E).

In this Petition for Writ of Certiorari we seek review of the affirmance of the conviction and sentence and outright reversal of the conviction.

REASONS FOR GRANTING THE WRIT

1. On the matters of the sufficiency of the Grand Jury indictment and the variance between the charges made in the indictment and the proof adduced in support thereof, the decision of the Fifth Circuit (App. A) conflicts in substance with the decisions of this Court in *Ex Parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1884); *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960); and *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); and with the decision of another Court of Appeals in *Gaither v. United States*, 413 F.2d 1061 (D.C. Cir. 1969). Moreover, despite facial reliance by the Fifth Circuit, in its opinion, upon *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. (1935) said opinion, conflicts substantially with the *Berger* decision.

As we have deliberately pointed out earlier in this Petition 18 U.S.C.A. §1001 sets forth three separate and distinct modes of violation, each of which constitutes a different course of conduct by which a criminal act or acts may be committed. They are stated in the disjunctive form and may, where warranted, be prosecuted separately. This distinction has been observed and has been controlling in a number of Federal case decisions. See *United States v. Uco Oil Company*, 546 F.2d 837 (9th Cir. 1976); *United States v. Bettenhausen*, 499 F.2d 1223 (10th Cir. 1974); *United States v. Heinze*, 361 F. Supp. 46 (D.C. Del. 1973).

In the instant case Petitioner was charged by the Grand Jury (in Count Two of the indictment) only with making a specific false statement to the F.H.A. by means of a letter (*viz.* that the installation of a fire

alarm system cost $3,800.00). On the face of the letter in question it is absolutely clear that the statement charged in the Grand Jury indictment does not appear. What does appear is an entirely different statement: "We were forced to expend . . . $6,400.00 for a Manual Fire Alarm system." Despite this Petitioner was convicted upon offered evidence that within the letter may have been enclosed an erroneous cost estimate that was prepared by one W. EDD HELMS indicating that the installation portion of the fire alarm system would cost $3,800.00 even though the indictment made no reference to any enclosure or the use by Petitioner of any enclosure. Accordingly, we submit that any conviction under said indictment violated the rights of Petitioner guaranteed to him by the Fifth Amendment, *supra*, (*i.e.* indictment by a Grand Jury upon the charges on which he may be tried and deprival of liberty and property without due process of law) and by the Sixth Amendment, *supra*, (*i.e.* that he be informed of the nature and cause of the accusation).

The basis of the Fifth Circuit's opinion on this point rested primarily upon the following statements (App. A, p. 7):

> "Mr. Guthartz submitted a letter claiming that a new fire alarm system *would* cost $6,400.00. The *jury may permissibly have concluded* that an integral part of his written statement was the false estimate showing the installation charge portion of such cost to be $3,800.00. . . ."

* * *

> "A review *of the entire record* reflects that there is no question whatever of Mr. Guthartz' not having been fully advised of the substance and, indeed, the details of the charged offense. . . ." (Emphasis supplied.)

These two statements compel two essential inquiries. What written statement was the Fifth Circuit referred to? Obviously, it was not the one charged in the indictment. And even if the entire record may have reflected that Petitioner had been fully advised of the substance and details of the charged offense, was this function performed by the indictment before the trial? We submit that obviously it was not. Whatever may have been revealed to Petitioner during the course and progress of the trial could in no way establish that the indictment met the requirements of the Fifth and Sixth Amendments or the tests prescribed in the conflicting legal decisions cited above.

In the *Berger* case, *supra*, quoted by the Fifth Circuit's opinion (App. A, p. 6), this Court held (at p. 82):

> "The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense."

This Court's decision in the *Russell* case, *supra*, held to the same effect as *Berger* with other considerations added. Application of the foregoing tests to the indictment in the instant case compels a decision directly contrary to that of the Fifth Circuit.

First, on the question of whether the indictment definitely informed Petitioner of the charges to the extent that he was able to present his defense and not be taken by surprise by the evidence offered at the trial we respectfully submit that where a defendant is charged under an indictment with making a specific false statement (*i.e.* one particular mode of violation) and on trial is confronted with evidence attempting to prove the using of a false paper or document (*i.e.* a completely different course of conduct as defined under 18 U.S.C.A., §1001) he must, of necessity, be hampered in the preparation and presentation of his defense. In this case the failure of the indictment to include the element of "using", to make any reference to "enclosures", and to mention the actual statement contained in the letter upon which his conviction necessarily was predicated (*viz.* that a new fire alarm system would cost $6,400.00) were all prejudicial to Petitioner. Had he been charged with the statement he actually made he would have been afforded the opportunity of demonstrating the truth thereof with payment records and with an explanation of how that amount was reached and what it represented. Instead he was faced with a charge that rendered such a defense futile and immaterial. He was charged with making a specific statement that obviously didn't exist and from the wording of the indictment could only guess and conjecture at what the proof in support thereof might be. The very fact that he didn't make the statement as charged availed him of naught but the privilege to come before this Court.

Second, on the question of whether the indictment afforded Petitioner protection against another prosecution for the same offense, we respectfully submit that in view of the tri-partite aspect of 18 U.S.C.A., §1001 there is nothing contained in the wording of Count Two which could have prevented a subsequent prosecution for having "used" a false writing or document, which is, in actuality, the offense for which he was convicted; and if he had been acquitted it is equally clear that under the wording employed in the indictment he would have been unable to plead that acquittal in bar of any future prosecution for the same offense couched in terms of the "using" aspect. Similarly, there was nothing that could have prevented a subsequent prosecution on a charge based on the actual statement contained in the letter even though that was, in substance, the only basis upon which the conviction was upheld in the Fifth Circuit's opinion, since it was a completely different statement than the one charged in the indictment.

In the *Bain*, *Stirone*, *Russell* and *Gaither* cases, *supra*, there are additional conflicts, relating to the sufficiency of the indictment and the variance between the charges and proof, based on the Fifth Amendment requirement of an indictment by Grand Jury for prosecutions under 18 U.S.C.A., §1001. Under the holdings of this Court in *Bain*, *Stirone* and *Russell* and of the District of Columbia Circuit in *Gaither*, once the Grand Jury selected the terms it meant to employ in the charges against Petitioner, it became legally impossible for the trial court to consider (or to permit the jury to consider) other substantive aspects of said statute. A charge based upon one particular statement could not be expanded to comprehend another entirely different statement; nor could a charge based upon one part of

the statute be expanded to take in acts which may have been in violation of a different part of the statute. Yet this is precisely what the trial court permitted in the instant case and what the Fifth Circuit sanctioned in its decision. Not only did the proof vary from the charges as made by the Grand Jury in Count Two of the indictment; but, in addition, the trial court, in instructing the jury as to the essential elements of the offense charged in the indictment, (*supra* at p. 13), added the aspect of "using", which was not charged.

Curiously enough, the Fifth Circuit cited the *Stirone* case in its opinion and pointed out that the *Stirone* application of the Fifth Amendment was the foundation for the Fifth Circuit's holding in *United States v. Lambert*, 501 F.2d 943 (5th Cir. 1974) that (App. A at p. 6): "if an indictment enumerates the particular facts alleged to constitute the element (sic) of a charged crime and the proof makes out the elements in a different manner, a fatal variance results." Notwithstanding its payment of "lip service" to the *Stirone* decision, the holding of the Fifth Circuit herein runs contrary thereto, and conflicts with *Bain*, *Russell* and *Gaither* on the same point of law.

2. The decision of the Fifth Circuit was silent upon the question raised by Petitioner, in his appeal, of whether he was prejudiced by the trial court's charge to the jury which required the determination by the jury of a question of law. We can only assume that, by its silence, the Fifth Circuit thereby rejected the position of Petitioner and sanctioned and approved the action taken by the trial court. We respectfully submit that in so doing the decision of the Fifth Circuit not only conflicts with decisions on the same matter in *United States*

v. Jordany, 508 F.2d 750 (7th Cir. 1975) and in *United States v. Beebe*, 467 F.2d 222 (10th Cir. 1972); but, also constitutes such a departure from the accepted and usual course of judicial proceedings as amounts to a denial of Petitioner's fundamental rights of "due process" (guaranteed by the Fifth Amendment) and a fair and impartial trial (guaranteed by the Sixth Amendment) and calls for an exercise of this Court's power of supervision.

The jury charge in question (*supra* at p. 12) was devastatingly prejudicial to Petitioner's defense. It went to the very heart of his position that the charges contained in the indictment were being expanded to include the very things that the Grand Jury had failed to charge—*i.e.*, the "using" of an allegedly enclosed false document. If "a letter . . . is a statement . . . within the meaning of the statute" then a finding by the trier of the facts that "the letter referred to in the indictment includes its enclosures" is tantamount to a finding that the enclosures are a "statement" within the meaning of the statute. Thus an offense which the Grand Jury did not charge was brought squarely before the trial jury for their consideration and determination.

At first glance, it might be said that all the trial court was doing in the aforesaid charge was placing before the jury the factual question of whether the $3,800.00 Helms proposal was one of the enclosures contained in the letter of August 29th, but such a position cannot comport with logic or reason under the circumstances of the case because such a factual question would be totally immaterial in the absence of a charge by the Grand Jury that included a reference to the enclosures and the aspect of "using".

We respectfully submit that the aforesaid charge to the jury not only was prejudicial, as aforesaid, but also constituted a charge to the jury to determine a *question of law.*

Count Two of the indictment charged Petitioner with making a false statement "by means of a letter". It made no reference whatsoever (as it well might have) to enclosures of any kind. Thus a question of whether the letter should be deemed to include its enclosures is clearly an issue of law.

This is evidenced and supported by the fact that the trial court made a ruling of law on this precise point when it held in its Order denying Petitioner's Motion for Judgment of Acquittal (App. C, at pp. 13-14) as follows:

> "The indictment charged that a false statement was made 'by means of a letter: (sic) and not 'within a letter' as represented by defendant. It would be a distortion of logic to define 'letter' as not containing its enclosures, especially when the letter indicates it is accompanied by enclosures."

In *United States v. Jordany, supra,* and *United States v. Beebe, supra,* it was held that it is the role of the judge and not the jury to determine issues of law. The decision of the Fifth Circuit apparently sanctioning the action taken by the trial court is, necessarily, in direct conflict on the same point.

3. On the matter of the materiality of the cost estimate, the alleged use of which was found by the trial court to constitute the making of a false statement by

Petitioner in violation of 18 U.S.C.A., §1001, the decision of the Fifth Circuit conflicts in substance with the decisions in *United States v. Radetsky,* 535 F.2d 556 (10th Cir. 1976) and *Bartlett and Company Grain v. United States,* 353 F.2d 338 (10th Cir. 1965).

Assuming *arguendo* that the enclosure of the cost estimate, *per se,* constituted the making of a false statement, we submit that it would nevertheless be immaterial. The prescribed test for materiality of a false statement under 18 U.S.C.A., §1001 is whether or not it had the capacity to influence the actions or decisions of a governmental agency. Even as pointed out by the Fifth Circuit in *United States v. Beer,* 518 F.2d 168 (5th Cir. 1975) the question of whether or not an alleged false statement is capable of influencing is a matter of law to be determined in the light of the background, circumstances and effect thereof.

Both *Bartlett* and *Radetsky* involved prosecutions for making material false statements (*Radetsky* under 18 U.S.C.A., §1001 and *Bartlett* under a similar, but parallel statute) wherein clearly false statements had been made to governmental agencies which factually, were capable of influencing them; but both decisions held that because of prescribed procedures and requirements established as prerequisites before the payment (*i.e.* the desired governmental agency action) could be approved the false statement was *incapable* of inducing payment and was therefore immaterial.

In the instant case there were prescribed procedures and prerequisites that had to be met before the rental increase sought by Petitioner could be approved finally by the F.H.A. These included *inter alia* (as established

by the Government's own witnesses and Exhibits): that before final approval of a rental increase was granted paid bills, cancelled checks, and sometimes further information were required; and that all approvals of requested rent increases had to be in accordance with the procedures and practices set out in the HUD Handbook and the procedures recited in Federal Register, Vol. 40, No. 90, dated February 26, 1975.

Accordingly, notwithstanding the truth or falsity thereof, any *estimate* which may have been sent to F.H.A. lacked the *de jure* capacity to influence, and could not, as a matter of law, have been the basis for any requested rent increase.

4. As with the question of jury charges, the decision of the Fifth Circuit was silent upon Petitioner's assertions relating to the matter of the multiplicity of the charges contained in the indictment. Briefly stated, Petitioner's position was that the charges made in Count One and Count Two, both being based on statements made in the same letter and for the same purpose constituted a single offense under 18 U.S.C.A., §1001 and, to the prejudice of Petitioner, could not properly be charged in multiple counts. Again, we are forced to indulge in the assumption that, by its silence, the Fifth Circuit thereby rejected the position of Petitioner and sanctioned and approved the action taken by the trial court. Accordingly, we respectfully submit that the decision of the Fifth Circuit conflicts squarely with the decision in *United States v. Bettenhausen*, 499 F.2d 1223 (10th Cir. 1974) upon the interpretation of 18 U.S.C.A., §1001 and that it conflicts, in substance, with the decisions of this Court in *Bell v. United States*, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955) and *United States v.*

Universal C.I.T. Credit Corp., 344 U.S. 218, 73 S.Ct. 227, 97 L.Ed. 260 (1952) upon the general matter of multiplicity.

The decision in the *Bettenhausen* case, *supra*, involved a further aspect of the distinction between the three different modes of violation encompassed in 18 U.S.C.A., §1001 concerning the pluralistic language employed in said statute only with respect to the "false statements" portion. In *Bettenhausen* the defendant (because he had submitted them in support of a tax return) had been indicted and convicted upon multiple counts of "using a false document" and his appeal, in part, was based upon the position that under the *Bell* decision and similar cases this constituted a single offense not subject to multiple prosecution. The Tenth Circuit in rejecting the application of *Bell* to the circumstances of the case, based its holding on the aforesaid distinction by saying (at p. 1234): "While in another clause §1001 uses the plural terms 'fraudulent statements or representations', in the clause we are concerned with the statute turned to the singular terms — 'any false writing or document.' . . ." In the instant case Counts One and Two charged Petitioner with making false statements by means of a letter (*i.e.* the same letter of August 29, 1975 from Petitioner to F.H.A.) and not with the using of any false writing or document. Under *Bettenhausen's* interpretation of *Bell* only a single offense could be involved in this case and multiple charges could not lie.

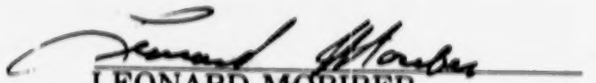
Bell appears to be this Court's "landmark" decision on multiplicity, wherein it was held that if Congress does not fix the punishment for a Federal offense clearly and without ambiguity, doubt will be resolved against

turning a single transaction into multiple offenses. The *Bell* decision has been followed and relied upon in numerous other Federal decisions and its application has been broadened to cover other crimes than the one specifically involved in *Bell* (*i.e.* violations of the Mann Act), including violations under 18 U.S.C.A., §1001. Holding to substantially the same effect as *Bell* was the *Universal C.I.T. Credit Corp.* case, *supra*, wherein this Court, on the matter of multiplicity, was concerned with whether the offense made punishable, under the statute in question therein, involved a course of conduct or individual acts, and, holding that it was the former stated: "A single offense is committed by all violations that arise from the singleness of thought, purpose or action which may be deemed a single impulse." We respectfully submit that application of the foregoing test to the circumstances of this case would conclusively establish that only a single offense was involved here.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted and that the judgment of the United States Court of Appeals for the Fifth Circuit should be reviewed thereby.

Respectfully submitted,



LEONARD MORIBER
Attorney for Petitioner
2077 N.E. 120th Road
North Miami, Florida 33181

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the above and foregoing Petition for Writ of Certiorari, and appendices thereto, were served on each of the following named persons by depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to J. V. ESKENAZI, United States Attorney, 300 Ainsley Building, Miami, Florida 33132 and, with air mail postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530, on this 24th day of July, 1978.

LEONARD MORIBER
Attorney for Petitioner

Appendix

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Barnett GUTHARTZ,
Defendant-Appellant.

Nos. 77-2404 and 77-5306

United States Court of Appeals,
Fifth Circuit.

May 18, 1978.

(Omitting WEST PUBLISHING CO. Synopses, Syllabi, and Key Number Classifications which constitute no part of the opinion of the Court.)

Appeals from the United States District Court for the Southern District of Florida.

Before WISDOM, TJOFLAT and VANCE, Circuit Judges.

VANCE, Circuit Judge.

This is an appeal by Barnett Guthartz from his conviction in the United States District Court for the Southern District of Florida of knowingly making a false statement to an agency of the United States government in violation of 18 U.S.C. section 1001.

Mr. Guthartz is an owner of the Bay Terrace Apartments in Miami Beach, Florida. Bay Terrace was financed by the Federal Housing administration under what is known as a 231 program which was designed to provide housing for the elderly and handicapped. Under a "regulatory agreement" between FHA and the owners the maximum amounts of the rents charged is regulated by FHA (now HUD).

In July and August 1975 Mr. Guthartz was undertaking to justify a rental increase and in that connection engaged in correspondence with the Department of Housing and Urban Development (HUD). The amount of the specific increase was contingent on information supporting increased costs and expenses, which was required to be supplied to HUD. A portion of such information involved "major expenditures" for capital improvements. In this connection Mr. Guthartz sent a letter to HUD dated August 29, 1975 wherein he stated:

> We are forced to expend $18,000.00 for a new Cooling Tower and $6,400.00 for a Manual Fire Alarm system.

On the face of the letter, beneath Mr. Guthartz' signature it was indicated that there were enclosures. One enclosure was an estimate theretofore provided to Mr. Guthartz by Mr. W. Edd Helm, Jr. concerning the fire alarm system. It reflected an installation cost in the amount of $3,800.00.

Subsequent to HUD's receipt of such letter and its approval of a rental increase, it was discovered that the actual cost of such fire alarm installation was $1,900.00. Mr. Guthartz' indictment followed.

18 U.S.C. section 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000.00 or imprisoned not more than 5 years, or both.

Mr. Guthartz was charged with violation of this statute in a two count indictment. He was acquitted on count one, which involved the claimed cost of a cooling tower. Count two, on which he was convicted, read in part that:

> On or about August 29, 1975 in the Southern District of Florida, the defendant, Barnett Guthartz, did willfully and knowingly in a matter within the jurisdiction of the Department of Housing and Urban Development, an agency of the United States, make and cause to be made, by means of a letter . . . a materially false, fictitious and fraudulent statement that the installation of a fire alarm system cost $3,800.00 when in truth and in fact as he then and there well knew the actual cost of the installation of said fire alarm system was $1,900.00 . . . .

With respect to this indictment the trial judge charged the jury:

> Whether the letter referred to in the indictment includes its enclosures is a question to be resolved by the jury.

After conviction the defendant filed a motion for new trial based on newly discovered evidence, his contention being that the testimony of the government's witness, Mr. Edd Helms, may have been untrue. An evidentiary hearing was held on such motion at which testimony was taken from an attorney for the defendant, from the defendant himself and from Mr. Helms. The court denied the motion for new trial and this appeal followed.

Defendant first argues that the indictment was defective and that there was a fatal variance between the indictment and the proof adduced at trial. Specifically he claims that the indictment charged him with "making" a false statement but that the proof

showed the "using" of false documents. Mr. Guthartz claims that the statute proscribes making false statements or using false documents in the disjunctive and that they are separate and distinct offenses. It is his position that the particular writing shown to have been false was the enclosed estimate, which was not *his* statement. Because he was not charged with the *use* of a false document he says that he was insufficiently charged and that there was a fatal variance between the proof and the charge made in count two.

If we should concede that the indictment might have been more precisely drawn this would not necessarily lead to the conclusion that reversible error has been committed. Specificity does not determine the sufficiency of an indictment. The established test is that the indictment first, must contain the elements of the offense charged and fairly inform the defendant of the charge against which he must defend; and second, enable him to plead an acquittal or conviction in bar of any future prosecution for the same offense. *Hamling, et al. v. United States,* 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). Its validity is determined by practical, not technical, considerations. *United States v. London,* 550 F.2d 206 (5th Cir. 1977); *United States v. Markham,* 537 F.2d 187 (5th Cir. 1976), *cert. denied* 429 U.S. 1041, 97 S.Ct. 739, 50 L.Ed.2d 752 (1977). The challenged indictment clearly meets the requirements of this rule. The elements of the offense were set forth and the accused was sufficiently advised as to the manner in which he was alleged to have violated the statute.

A somewhat more convincing argument is presented by defendant's contention that there was a fatal variance between the indictment and the proof. The

traditional statement of the controlling rule reflects merely a second facet of the same principles governing the indictment's sufficiency:

> The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense. *Berger v. United States,* 295 U.S. 78, 82, 55 S.Ct. 629, 630, 79 L.Ed. 1314 (1935).

Later cases require that an added dimension be considered. The supreme court pointed out in *Stirone v. United States,* 361 U.S. 212, 218, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960) "The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." This application of the Fifth Amendment was the foundation of this court's holding in *United States v. Lambert,* 501 F.2d 943 (5th Cir. 1974) that if an indictment enumerates the particular facts alleged to constitute the element of a charged crime and the proof makes out the elements in a different manner, a fatal variance results. In looking to the evidence, therefore, we consider both aspects: that the accused must have been adequately apprised of that which he was called on to defend and that there must have been no infringement of his right to be tried only on charges presented in an indictment by a grand jury; as well as

the requirement that he be protected from a second prosecution for the same offense.

Application of the foregoing principles to the circumstances in this case presents no great difficulty. Mr. Guthartz submitted a letter claiming that a new fire alarm system would cost $6,400.00. The jury may permissibly have concluded that an integral part of his written statement was the false estimate showing the installation charge portion of such cost to be $3,800.00. The evidence showed that a true estimate in the amount of $1,900.00 was given to Mr. Guthartz initially by Edd Helms. The false estimate in double that amount was provided defendant at his request, but as between him and Helms was never intended to be used. When he sent his letter and the enclosed estimate to HUD he thereby made a false statement "by means of a letter" as he was charged. A review of the entire record reflects that there is no question whatever of Mr. Guthartz' not having been fully advised of the substance and, indeed, the details of the charged offense. He was tried only on the charges presented in the indictment returned by the grand jury. To whatever degree the disjunctive provisions of section 1001 may be distinguished, it is clear that no such distinction affected the substantial rights of this accused.

Defendant's challenge of the materiality of the false statement is also without merit. Mr. Austin D. Hurt, a HUD loan supervisor, testified that applications for rental increases are made on the basis of the claimed need for the increase and "supportive material." The letter and fabricated estimate met this description. Mr. Thomas Newberry, a HUD mortgage servicer, testified that he would not have granted as high a rent increase as

he did if he had known the true installation cost of the Bay Terrace fire alarm system. To be material it is sufficient that the statement had the capacity to influence the determination which was required to be made. *United States v. Beer,* 518 F.2d 168 (5th Cir. 1975). Here there was more. From the testimony of HUD officials it appears clear that there was actual reliance on the letter and enclosure.

Mr. Guthartz' motion for new trial based on newly discovered evidence was addressed to the sound discretion of the trial judge and will not be overturned unless an abuse is shown. *Hudson v. United States,* 387 F.2d 331 (5th Cir. 1967), *cert. denied* 393 U.S. 876, 89 S.Ct. 172, 21 L.Ed.2d 147 (1968); *United States v. Jacquillon,* 469 F.2d 380 (5th Cir. 1972). The trial judge conducted a hearing on the motion and received the testimony of Mr. Guthartz, his attorney and Mr. Helms, whose trial testimony was attacked as untruthful. Helms reaffirmed his earlier testimony. At the conclusion of the hearing the trial judge concluded that Helms' testimony was believable and was not satisfied that the testimony of a material witness was false. The requirements of *Martin v. United States,* 17 F.2d 973 (5th Cir. 1927), *cert. denied* 275 U.S. 527, 48 S.Ct. 20, 72 L.Ed. 408 (1927) on which defendant relies simply were not met.

We find no merit in any of appellant's contentions of error.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

United States of America

v.

BARNETT GUTHARTZ

No. 77-36-CR-NCR

On this 14th day of April, 1977 came the attorney for the government and the defendant appeared in person and by Counsel, Andrew Hall Esq.

IT IS ADJUDGED that the defendant upon his plea of Not Guilty, and having been found Guilty by a Jury has been convicted of the offense of knowingly making a false statement to an agency of the U.S. Government, to wit: Housing, Urban Development in violation of Title 18 U.S.C. Section 1001 as charged in Count 2 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period

of TWO (2) YEARS, or until otherwise discharged by due process of law, it being further

ORDERED AND ADJUDGED that pursuant to the split-sentence provision of Title 18 U.S.C. Chapter 231, Section 3651, the defendant be confined to a jail-type institution for a period of FOUR (4) MONTHS, thereafter execution of the remainder of sentence of confinement be suspended, and commencing immediately upon discharge from incarceration, the defendant be placed on probation for a period of TWO (2) YEARS, under the standing conditions of Probation as defined by the Court's Order entered August 1, 1964, it being further

ORDERED that the defendant shall pay a fine unto the United States of America in the amount of Seven Thousand Five Hundred ($7,500.00) Dollars, payable within 90 days and, upon default, to stand committed until paid, or until discharged by due process of law, it being further

ORDERED that execution of sentence of confinement be deferred until May 19, 1977, at 10:00 A.M. at which time the defendant shall surrender himself, at his own expense, to the Institution designated by the Bureau of Prisons, or in the alternative to the U.S. Marshal at Miami, Florida.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Norman C. Roettger, Jr.
NORMAN C. ROETTGER JR.
United States District Judge.

The Court recommends commitment to Eglin A.F.B. Florida

Clerk.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 77-36-CR-NCR

UNITED STATES OF AMERICA
Plaintiff,

Vs.

BARNETT GUTHARTZ,
Defendant.

ORDER

THIS CAUSE is before the court on defendant's motion for a judgment of acquittal not withstanding the verdict or alternatively, for a new trial. Defendant raises several grounds in support of his motion.

Relying primarily on *Lambert v. United States*, 501 F.2d 843 (5th Cir. 1974), defendant first contends that the conviction on count II is an impermissible amendment or fatal variance in the indictment. However, the *Lambert* case is distinguishable. Defendant was charged with making a false statement to the F.B.I. that he was "severly beaten and subjected to illegal and unecessary punishment by two police officers in violation of his civil rights". However, the evidence at trial showed that the actual statement was "I feel that my civil rights were

violated because I was arrested for no good reason". The court found this to be too wide a variation between the statement charged and that proven, because it did not give defendant sufficient notice of the charge. Instead, it left defendant "to guess what part or parts of the statement placed in evidence the government will rely upon". 501 F.2d at 948.

In the instant case, defendant was charged in count II with making and causing to be made, by means of a letter to an official of HUD, a false and fraudulent statement that the cost of the installation of a fire alarm system was $3,800 when he knew in fact that the cost was $1,900., all in violation of Title 18 U.S.C. §1001.

The evidence offered at trial was that a letter signed by defendant was sent to an official of the Department of Housing and Urban Developement, wherein it was stated that "we were forced to expend $6,400. dollars for a new fire alarm system". Enclosed with that letter was a proposal from Edd Helms, Inc. for the installation of a fire alarm system at a cost of $3,800. Mr. Helms, testified that defendant was charged and paid $1,900., and that during the contract negotiations, defendant requested Mr. Helms to prepare two proposals — one for $1,900., and one for double that amount. From this evidence the jury certainly could have concluded that the statement made via the enclosure was false, and that defendant had the requisite knowledge.

The indictment charged that a false statement was made "by means of a letter: and not "within a letter" as represented by defendant. It would be a distortion of logic to define "letter" as not containing its enclosures, especially when the letter indicates it is accompanied by

enclosures. The offense charged was the offense proven, and there was therefore no variance as in the *Lambert* case, supra.

Defendant next contends that the conviction under count II cannot stand by reason of the doctrine of multiplicity.[1] To determine whether separate offenses may be carved out of a single incident, the offenses should be examined to see whether each requires proof of a fact that the other does not. *United States v. Chrane,* 529 F.2d 1236 (5th Cir. 1976). In this case defendant was charged with making two separate false statements. Although they were contained in the same letter, the proof of falsity as to each statement requires a different factual showing. Therefore two offenses were stated, *United States v. Richards,* 408 F.2d 884 (5th Cir. 1969), and the claim of multiplicity is without merit.

Defendant next contends that the government failed to prove its case. Viewing the evidence in the light most favorable to the government, *Glasser v. United States,* 315 U.S. 60, 80 (1942) the court finds that there is enough evidence for the jury to reasonably conclude that defendant knowingly caused the false statements to be made.

On the question of materiality, defendant contends that the statement made in the enclosure to the letter could not be material, because the FHA did not rely on

[1]Defendant refers to both "duplicity" and "multiplicity" in his motion. Duplicity is the joining in a single count of two or more separate offenses. Multiplicity is the charging of a single offense in separate counts. *United States v. Starks* 515 F.2d 112 (3rd Cir. 1975). Therefore only a claim of "multiplicity" is involved in this case.

the enclosures, but looked instead to the letter. It is clear that the government doesn't have to prove reliance on the statement, but only that the statement has the "capacity to influence". *United States v. Beer,* 518 F.2d 168,172 (5th Cir. 1975). In this regard, Tom Newberry of the FHA testified that he relied primarily on the letter in approving the rent increase. However, he also stated that the rent increase would not have been approved had the true cost of the installation been disclosed. Therefore the court finds that based on all the evidence, the statement had the capacity to influence and was material.

Finally, defendant alleges that the prosecutor's opening remarks were so prejudicial that a new trial is required. However, assuming that the remarks were improper, this was not a case such as *Handford v. United States,* 249 F.2d 295 (5th Cir. 1958) in which the evidence was so close and circumstantial that prejudice from the remarks would be highly probable. Therefore the court finds that any error in making the statements was cured by the court's instructions to the jury that statements of counsel are not evidence and they should consider only the evidence in reaching their verdict.

Having considered the entire record in this cause, it is

ORDERED AND ADJUDGED that defendant's motion for a judgment of acquital not withstanding the verdict or alternatively for a new trial is hereby denied.

DONE AND ORDERED this 24 day of May, 1977.

/s/ Norman C. Roettger, Jr.
United States District Court Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2404
77-5306

D. C. Docket No. 77-36-Cr-NCR

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

BARNETT GUTHARTZ,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

Before WISDOM, TJOFLAT and VANCE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

May 18, 1978

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

June 26, 1978

TO ALL PARTIES LISTED BELOW:

NO. 77-2404 and
77-5306

U.S.A. vs. Barnett Guthartz

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk

By /s/ Clare F. Sachs
Deputy Clerk

cc Mr. Leonard Moriber
Mr. Charles A. Intriago